Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MICHAEL BRYANT BRUMLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ Of Certiorari to the United States Court Of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI VOLUME I

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60 pp

QUESTIONS PRESENTED

1. Whether 18 U.S.C § 1346 (1988) extends the wire fraud statute (18 U.S.C. § 1343) to criminalize misconduct by a state employee in circumstances where the misconduct does not occasion the state, any entity or person a tangible loss or gain and only offends the ethereal concept of honest and impartial government.

2. Whether the Federal Government can or should exercise its jurisdiction to include the prosecution and punishment of state employees whose conduct does not affect interstate commerce — the Tenth Amendment issue.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were defendant-appellant Michael Bryant Brumley (petitioner herein), and plaintiff-appellee the United States (respondent herein).

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PETITION FOR A WRIT OF CERTIORARI

Michael Bryant Brumley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit are reported at: *United States v. Brumley*, 59 F.3d 517 (5th Cir. 1995) (*"Brumley I,"* App. 1a-13a), *withdrawn*, 79 F.3d 1430 (5th Cir. 1996) (*"Brumley II,"* App. 14a-38a), *reh' g en banc granted*, 91 F. 3d 676 (5th Cir. 1996) (App. 39a-40a); and *United States v. Brumley*, 116 F. 3d 728 (5th Cir. 1997) (*"Brumley III,"* App. 41a-84a). These opinions are reprinted at pages 1a-84a of Appendix to this petition. There is no published opinion of the United States District Court for the Eastern District of Texas, the court in which petitioner was convicted and sentenced.

I. PROCEEDINGS BELOW

At bench trial, Michael Bryant Brumley ("Brumley") was convicted and sentenced for 1) conspiracy to defraud State of Texas citizens of their *intangible right to his (Brumley's) honest services* by using interstate wire communications - 24 months; 2) three counts of wire fraud - 24 months on each count; 3) three counts of money laundering - 48 months on each count; and 4) two counts of making a false statement to a financial institution - 24 months on each count.[1] Brumley did not challenge the false statement convictions and simply requested resentencing if, on appeal, the wire fraud and/or money laundering convictions fell.

A panel of the Fifth Circuit Court of Appeals first **reversed** the convictions for wire fraud, and money laundering and conspiracy. *Brumley I*. The panel reversed for lack of evidence that Brumley could foresee the interstate character of the wire transmission relied upon by the government. After withdrawing this opinion, the panel, with one judge dissenting, held that the term "another" as used in 18 U.S.C. § 1346 does not reach citizens of a state or political subdivision who have been deprived of the

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[1]Case No. 1:93CR110-1, in the United States District Court for the Eastern District of Texas, Honorable Richard A. Schell presiding.

honest services of their public officials and **vacated** the convictions. *Brumley II*. The government's petition for rehearing *en banc* was granted on July 17, 1996. *United States v. Brumley*, 91 F. 3d 676 (5th Cir. 1996). On June 18, 1997, the *en banc* Court, with three judges strongly dissenting, **affirmed** all convictions heretofore vacated by the panel. *Brumley III*.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 18, 1997. Petitions for rehearing and for reinstatement of the first panel decision were denied on July 23, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions at issue are 18 U.S.C. § 1343, 18 U.S.C. § 1346, and § 36.08, Tex. Penal Code, which are reprinted in the Appendix to this petition at pages 85a through 87a.

STATEMENT

This case presents a State of Texas employee who has been convicted of wire fraud for depriving the citizens of the State of Texas of their intangible right to honest and impartial government.

I. BACKGROUND FACTS.[2]

A. The IAB, Brumley, The Lawyers, And The Loans.

Texas' workers' compensation law was long administered by the Texas Industrial Accident Board ("IAB"). Under this regime the Board dealt with three groups: claimants, their lawyers, and insurance carriers insuring the employers. Brumley worked for the Board and resided in Beaumont, Texas. In 1990, the Texas legislature changed the process for resolving workers' compensation claims. The Board became the Texas

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[2]The record is in excess of 1800 pages and contains over a thousand pages of documentary exhibits. Virtually all factual statements are derived from *Brumley III* (App. 41a-84a) and the Superseding Indictment. A few other significant facts are accompanied by references to the record or exhibits.

Workers' Compensation Commission, and Brumley was promoted to Regional Associate Director of the new commission and moved to the new commission's Houston office. Brumley's duties included the handling of claims arising under the old law and responsibility for "identifying attorneys and insurance carriers who failed to follow TWCC or IAB rules and regulations." Brumley's work gave him knowledge about personal injury claims and unrepresented claimants. The government stipulated that he never used this knowledge to benefit himself or any attorney, and did not claim that Brumley "ran cases" or enhanced awards. R. I, 6-7. App. 88a-90a.

Brumley resided in Beaumont, Texas. In addition to his state job, he owned a commercial cleaning business. In the mid-1980's, Brumley was appointed to the City Planning & Zoning Commission. He was elected to the Beaumont City Council in 1986 and served until 1990. Despite this apparent success, Brumley never was able to live within his income. By 1992 Brumley had borrowed money from at least eleven lawyers with whom he had political, church and social relationships. These lawyers all represented claimants before the IAB.

In the early 1980's, Brumley struck up a personal relationship with John M. Cely, a Lufkin attorney with a substantial workers' compensation practice. Cely made frequent appearances before Brumley in prehearing conferences. In 1987, Brumley advised Cely that he was debt-ridden and needed to borrow money for his business. Cely agreed to help Brumley and began wiring money from the Western Union office in Lufkin to Brumley in Beaumont (and later in Houston). These wire transfers were intrastate, but were recorded by a Western Union facility outside of Texas. *Brumley I*, App. 9a. From 1987 to May of 1992, Cely made some seventy wire transfers to Brumley totaling approximately $86,730. In all, Brumley "borrowed" some $112,156 from various lawyers, including Cely. Brumley defaulted on all the loans.

B. Brumley And Cely — The IAB Investigation And The Lufkin Lease.

1. The IAB investigation.

In 1990, the Texas Industrial Accident Board, in response to a complaint filed by a claimant who had been represented by Cely, began an investigation. The IAB investigation of Cely encompassed all his files over

a two-year period and centered on whether Cely was, without IAB approval, deducting money from his client's portion of settlements and sought to ascertain if Cely was keeping the money later reimbursed by the workers' compensation carrier. In the claim giving rise to the Cely investigation, Brumley was the IAB officer who did not approve Cely's request to deduct certain expenses. Brumley's position gave him the power to initially approve any deduction or to quickly end the IAB's investigation of Cely by retroactively approving the deduction in question, yet he did neither. The IAB audit ultimately revealed no theft and that Cely had merely recouped his out of pocket expenses immediately and later on reimbursed the client when the workers' compensation insurance carrier reimbursed him. R. IX, 569. Cely was given the minimal 30-day suspension by the IAB for technical violations of IAB rules. Gov. Ex. 45A.

In the context of this IAB investigation, Brumley 1) vouched for Cely's good character, and 2) advised Cely to alter documents. *En banc* Opinion, App. 55a. Brumley and Cely were close friends and Brumley did vouch for his character; however, the government's only witness from the Lufkin area confirmed that at the time Brumley vouched for Cely's character Cely did have a good reputation. R. IX, 915. After he vouched for Cely, Brumley was shown proof of Cely's unauthorized deduction by IAB Board Chairman Bobby Barnes and said nothing further on Cely's behalf. R. IX, 663-669. Brumley's advice that Cely make sure his records disclosed that the claimant was fully reimbursed was part of Brumley's job function. Cely only altered his own records. R. XIII, 1427. Government exhibit 143 is an example of an "alteration." App. 92a-93a.

2. The lease.

In 1991, Brumley and Cely openly discussed the Texas Workers' Compensation Commission's (TWCC) plan to lease property in Lufkin, Texas. These lease specifications were open to public bid and had long been on public record. Cely never submitted a bid to lease the property on behalf of himself or any client. Brumley never made any recommendations that any property be leased from Cely or any of Cely's clients. The state employee in charge of leasing the property had no communication with Cely or Cely's client and did not state that Brumley interfered with or affected any lease negotiations. R. VIII, 384-385; IX, 420.

C. The Indictment Alleges No *Quid Pro Quo* Or Hobbs Act[3] Conduct.

The Superseding Indictment does not allege bribery. Although the original indictment alleged Hobbs Act violations, the Superseding Indictment dropped the Hobbs Act count after the government interviewed Cely and the other attorneys. R. X, 742.

In part, the Superseding Indictment alleged:

> "During the period of 1987 through 1992, Brumley showed favoritism to Cely in the manner in which Cely's cases were handled ..." (pg. 15, ¶23)
>
> "It was a further part of the scheme for Brumley to use his official position as a State employee to attempt to provide favoritism to Cely ..." (pg. 20, ¶6)
>
> "On or about a date in 1982 and continuing until on or about a date in June of 1992, in the Eastern District of Texas and elsewhere, the Defendant, Michael Bryant Brumley, having intentionally and willfully devised the scheme and artifice described in Paragraphs A-1 through 23 and B-1 through 30, to defraud and deprive the citizens of the State of Texas, including the Industrial Accident Board and its successor (the Texas Workers' Compensation Commission), a State agency, of the intangible right to good, faithful and honest service ..." (pg. 21)

Any analysis of how the Fifth Circuit has construed and applied § 1346 should begin with the indictment's allegations of ethical violations and appearances of favoritism and its failure to allege that any attorney, claimant, insurance carrier, health care provider or bank gained or lost anything.

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[3] 18 U.S.C. § 1951.

II. THE FIFTH CIRCUIT ANALYSIS

> **Rather than construe the statute [mail fraud, § 1341] in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.** *McNally v. United States*, 483 U.S. 350, 360, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987).
>
> **We held in *McNally* that the mail fraud statute does not reach "schemes to defraud citizens of their intangible rights to honest and impartial government' and that the statute is "limited in scope to the protection of property rights."** *Carpenter v. United States*, 484 U.S. 19, 108 S.Ct. 316, 320, 98 L.Ed.2d. 275 (1987).
>
> **§ 1346. Definition of "scheme or artifice to defraud"**
> **For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services. (Added Pub.L. 100-690, Title VII, § 7603(a), Nov. 18, 1988, 102 Stat. 4508.)** 18 U.S.C. § 1346 (1988).
>
> **We are persuaded that a governmental entity qualifies as "another" within the meaning of § 1346, and that "honest services" can include "honest and impartial government."** *En banc* Opinion, App. 48a.

The Fifth Circuit has simply stated that the enactment of § 1346 removed the limitations *McNally* placed on § 1343. The Court construed the term "another" to include a governmental entity. The Court next construed "honest services" to mean services that a state employee owes under state law. In order for its construction to be self-fulfilling, the Court then construed the term "honest services" to include honest and impartial government. Once "another" is construed to include a governmental entity and the term "honest services" is construed to include honest and impartial [state] government, the wire fraud statute judicially metamorphosizes into a comprehensive anti-corruption statute. The minimalist language of § 1346 then suffices for all the proposed anti-corruption laws which the government desired but which Congress failed to enact in 1989, 1990, 1991, and 1992. That § 1346's innocuous wording provided notice to Brumley in 1992 that his latent conflicts of interest constituted a federal crime is the crux of the Fifth Circuit's decision.

REASONS THAT THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

I. THE FIFTH CIRCUIT COURT OF APPEALS' DECISION THAT § 1346 CRIMINALIZES STATE EMPLOYEE MISCONDUCT IN CIRCUMSTANCES WHERE THE MISCONDUCT ONLY VIOLATES AN ETHICS-BASED MISDEMEANOR STATUTE AND DOES NOT CAUSE THE STATE NOR ANY ENTITY OR PERSON A TANGIBLE OR INTANGIBLE LOSS OR GAIN IS CONTRARY TO THIS COURT'S DECISION IN *MCNALLY V. UNITED STATES*[4] AND CONFLICTS WITH DECISIONS APPLYING § 1346 IN THE FIRST, SECOND, THIRD, FOURTH, EIGHTH, AND ELEVENTH CIRCUITS.

In *McNally*, this Court restricted the application of the wire fraud statute in four areas involving intangible rights.[5] Separate and apart from

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[4]483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987).

[5](1) State and federal officials convicted of defrauding citizens of their right to the honest services of their governmental officials (*Footnote 1*, *Id.* at 362, 107 S.Ct. at 2883); (2) Elected officials and campaign workers convicted of mail fraud for using the mail to falsify votes, thus defrauding the citizenry of its right to an honest election (*Footnote 2*, *Id.* at 363, 107 S.Ct. at 2883); (3) In the

its construction of the mail and wire fraud statutes, *McNally* and *Carpenter* reaffirm the principle that this Court has consistently held that criminal statutes be narrowly construed. *Rewis v. United States*, 401 U.S. 808, 812 (1971). In the instant case, the Fifth Circuit has ignored this guiding principle. Rather than restrictively construe § 1346 as only encompassing private sector deprivations of intangible rights occasioned by breaches of fiduciary duties, the Fifth Circuit gives any uncertainty in § 1346's scope an expansive construction. This Court never invited such a construction in *McNally*, nor condoned it in an area so sensitive as the state/federal relationship. *United States v. Bass*, 404 U.S. 336, 339-341, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971).

The enactment of 18 U.S.C. § 1346 has done nothing to alleviate the pre-*McNally* unevenness occasioned by the various circuits' wrestling with the concept of what constitutes a deprivation of honest services. If § 1346 is a federal anti-corruption statute, it is necessary for this Court and not the various circuits to supply the answers to the following questions: (1) Does § 1346 reach public sector employees? and (2) What type of conduct falls within the scope of a deprivation of honest services? Any unevenness in the circuits is incompatible with the concept of a uniform approach necessary to a federal anti-corruption statute that affects millions of state employees. *United States v. Ruzicka*, 329 U.S. 287 (1948).

The instant case gives this Court a singular opportunity to address the concept of a federally enacted statute criminalizing the deprivation of honest services because it is not attenuated with bribery or Hobbs Act allegations and presents conduct on the cusp of constitutional questions concerning the Eighth, Ninth, and Tenth Amendments.

A. 18 U.S.C. § 1346 Was Not Invited And Should Fall.

McNally did not invite an amendment to the wire fraud statute. *McNally* indicated that in order criminalize the deprivation of solely ethereal rights, a specifically dedicated statute was necessary. If the instant

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private sector, agents with clear fiduciary duty to their employers or unions, found guilty of defrauding by accepting kick backs or selling confidential information (*Footnote 3*, *Id.* at 363, 107 S.Ct. at 2883); and (4) In the private sector, defendants convicted for defrauding individuals of their rights to privacy and other non-monetary rights (*Footnote 4*, *Id.* at 364, 107 S.Ct. at 2884).

case presented corruption, it was in the form of bribery or Hobbs Act and it did not need to be predicated upon the deprivation of any ethereal right. *Carpenter*'s extension of the wire fraud statute to the concept of intangible property rights reaches the outer limits of what is commonly understood as fraud. In enacting § 1346, Congress solved no post-*Carpenter* problems concerning the concept of honest services. By requiring more than mere proof of a violation of an underlying state law, the First Circuit has construed § 1346 no differently than this Court construed the wire and mail fraud statutes in *Carpenter*. *United States v. Sawyer*, 85 F.3d 713, 728-729 (1st Cir. 1996). In *Brumley*, the Fifth Circuit construed honest services as services owed by reason of state law thereby creating a different version of § 1346 for each state. *En banc* Opinion, App. 55a. This is not the dedicated statute championed by proponents of federal anti-corruption legislation, but a return to the *ad hoc* approach contra-indicated in *McNally*. Brumley urges that in light of *Carpenter* § 1346's literal ambiguity renders it a useless appendage to the mail and wire fraud statutes. As applied by the Fifth Circuit, § 1346 should be struck down because it does not respond to *McNally*'s requirement for a clearly dedicated anti-corruption statute criminalizing the deprivation of a citizen's ethereal right to honest and impartial state government. *See* S.2793, App. 79a-84a.

B. "... To Deprive *Another*" — The Rule Of Lenity.

In order to make § 1346 applicable to the public sector, the Fifth Circuit reasoned "another" could include a governmental entity by deducing that 1 U.S.C. § 1's failure to specifically exclude such construction allows for "another" to be so construed. More than pervert, the Fifth Circuit's deduction actually subverts the rule of lenity because it forsakes the literal and commonly understood limitations of the term "another" in favor of a meaning which may be inferred; and thereby finds that the term "another" is not ambiguous. Had § 1346 provided, "*For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice resulting in any deprivations of the intangible right of honest services*," the problems presented in extending the statute to include the public sector would be diminished. As enacted, the statute did contain the word "another" and as such should be construed to reflect the limitations commonly associated with the term. *Gregory v. Ashcroft*, 501 U.S. 452 (1991). The Fifth Circuit did not actually construe "another," it merely stated it was construing "another" and construed the statute as if the

term "another" had not been included in the wording. *McNally* was a statutory construction case guided by the rule of lenity. Had this Court in *McNally* applied the rule of lenity in the manner that the Fifth Circuit applied the rule of lenity in *Brumley*, Mr. McNally would have gone to prison.

C. The "Appearance Of A Conflict Of Interest" Is Not Dishonest Service.

The Court of Appeals next construes "honest services" to encompass the indictment's allegation of "favoritism." The Court of Appeals reasoned that honest services can include the appearance of "impartial" government and that "favoritism" is not "impartial" government. A state employee whose conduct has the appearance of a conflict of interest in contravention of a state ethics statute thusly deprives the citizens of their ethereal right to the appearance of honest government. By so finding, the Court of Appeals recognizes that it is confronting an ill-defined concept and attempts to create a proviso so that its construction avoids due process notice requirements occasioned by § 1346's ambiguous language. The proviso employed by the Fifth Circuit is that under § 1346 a state law predicate violation must necessarily attach to the federal jurisdictional aspect. This construction is remarkable in its audacity because it creates a totally unintended and unforeseeable consequence to state conflict of interest laws. That this unintended and unforeseeable consequence goes to the essence of federalism by preempting state criminal punishments is without concern. The result is that the Fifth Circuit Court of Appeals has accomplished what neither Congress nor any state legislature ever even contemplated — enact an anti-corruption statute that makes it a federal felony for a state employee's conduct not to appear to be impartial or to have the appearance of a conflict of interest. This directly conflicts with *United States v. Sawyer* and is devoid of pre-*McNally* precedent.[6]

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[6]Historically, the honest service doctrine was applied to a variety of bribery and kickback schemes involving public officials. *See, e.g., United States v. Silvano*, 812 F.2d 754 (1st Cir. 1987) (city budget director); *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982) (party leader), *reh. denied*, 811 F.2d 46 (1982); *United States v. Barber*, 668 F.2d 778 (4th Cir. 1982) (state commissioner), *cert. denied*, 459 U.S. 829, 103 S.Ct. 66 (1982); *United States v. Holzer*, 816 F.2d 304 (7th Cir. 1987) (judge); *United States v. Brown*, 540 F.2d 364 (8th Cir. 1976) (city building commissioner). These pre-*McNally* cases

D. § 1346 Has No Legislative History - Is The Dissent Correct?

The significance of § 1346's lack of legislative history is that any ambiguity in a statute can, in some cases, be resolved with the benefit of pre-enactment legislative intent. Section 1346 does not have the benefit of any legislative history and leaves the various circuits to struggle with the ambiguities occasioned by the inclusion of the term "another;" its failure to contain any specific reference to "states" or "state citizens;" and its lack of statutory definitions for the terms "honest," "services," or "honest services." In the case of a criminal statute which the Supreme Court has previously held does not extend to or reach conduct which Congress may want to make criminal, the burden is on Congress to enact a statute that (i) "speaks more clearly than it has" (*McNally*); (ii) "gives fair warning to the world in language that the common world will understand" that a crime will be committed if a certain line is passed (*Bass*); and (iii) in the area of "the sensitive relation between federal and state criminal jurisdiction," the language makes a "clear statement" which "assures that the legislature has in fact faced ... the critical matters involved" (*Bass*). None of the above is evidenced in § 1346. The Fifth Circuit's holding that § 1346 satisfies the foregoing requirements is without any support in the statute's legislative history because the statute has no legislative history. Subsequent efforts by Congress to pass a dedicated anti-corruption statute are fully discussed by the sharply worded dissent. App. 56a-78a. If § 1346 is what the Fifth Circuit says it is in *Brumley III*, Congress and the government also were on notice of § 1346's reach thereby depriving us of their honest services when they attempted to pass the same law in 1989, 1990, 1991, and 1992 which they now claim was clearly enacted in 1988. If Congress' and the government's subsequent efforts indicate that § 1346 does not have the reach attributed to it by the Fifth Circuit, then this petition should be granted.

E. Acceptance Of A Benefit Is A Lesser Included Offense Of Bribery.

The distinction between ethical misconduct and criminal misconduct is critical to analyzing how the Fifth Circuit erroneously construed and applied § 1346. Ethical codes address conduct by its outward perception.

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limit the honest service doctrine to situations where there is a clear example of *quid pro quo* conduct.

Criminal laws address conduct by its internal motivation — *mens rea*. Without proof of a corrupt intent a state employee's acceptance of loans cannot constitute bribery, but is sufficient to constitute a violation of § 36.08(e) of the Texas Penal Code because the misdemeanor statute focuses on the perception of the conduct. Unlike the Hobbs Act or state bribery statute, the Texas misdemeanor statute requires no fraudulent *mens rea*. This law is part of Title 8 of the Texas Penal Code and deals with offenses against public administration. The relevant portion of § 36.08(e), Tex. Penal Code, provides:

> A public servant who has judicial or administrative authority, who is employed by or in a tribunal having judicial or administrative authority, or who participates in the enforcement of the tribunal's decision, commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any matter before the public servant or tribunal.

The Fifth Circuit denies a state employee due process when it dispenses with the distinction between acceptance of a benefit and bribery. The Fifth Circuit's finding that "in exchange for money Brumley used his position" ignores the trial court's finding that Brumley violated § 36.08, Tex. Penal Code.[7] The indictment did not allege and the trial court did not find (and could not find, *United States v. Sutherland*, 665 F.2d 1181, 1189 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982)) that Brumley violated the Texas bribery statute.[8] Section 36.08(e) is a lesser included offense to the bribery statute. *Hubbard v. State*, 668 S.W.2d 419

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[7]Brumley received approximately $86,000 from Cely. Persons familiar with Brumley's IAB duties would know that to characterize this as a bribe would be analogous to giving $5,000 to a meter maid to void a $10 parking ticket. The only "power" Brumley had was to enhance awards or to "run cases," and the government stipulated that this did not occur.

[8]The trial court did, however, state "that there existed and developed a conspiracy in the form of a tacit agreement or understanding between the two defendants that in return for the wire transfers, which cannot under the circumstances be construed as loans, Brumley would use his position to help and protect Cely." R. XVI, 13. The trial court's statement is irreconcilable with the indictment or with its finding that Brumley violated § 36.08(e), Tex. Penal Code.

(App. 5th Dist., 1984), *review granted, rev'd on other grounds*. The Court of Appeals is convicting a state employee of wire fraud predicated upon bribery in circumstances where the indictment specifically charged him with conduct that only violated § 36.08(e), Tex. Penal Code. The distinction is critical because under Texas law a violation of § 36.08(e) is a misdemeanor that requires no corrupt intent.

The trial court's finding that Brumley violated § 36.08(e) precludes Brumley's conduct from being characterized as bribery because it convicts him of the lesser included offense of accepting a benefit and by doing so acquits him of bribery. This is the only finding compatible with the indictment. *Hubbard v. State, supra*. Brumley's convictions for wire fraud and money laundering directly conflict with the First Circuit's holding that, "a violation of state law that prohibits only appearances of corruption will not alone support a violation of §§ 1343 and 1346. *United States v. Sawyer* at 728-29.

F. Neither The Trial Court Nor The Court Of Appeals Can Amend The Indictment— The Variance Issue.[9]

The Court of Appeals having first deconstructed the literal language of the statute to reach Brumley's status next reconstructs the language of the indictment to criminalize Brumley's conduct. The Court of Appeals recognized that a violation of a state law that prohibits the appearance of corruption may not alone support a § 1346 conviction. *En banc* Opinion, App. 53a (acknowledging *United States v. Sawyer* at 728-729). The Court of Appeals circumvents the signal language of the First Circuit in *Sawyer* and erroneously finds that, "Brumley, in exchange for money, used his position to assist Cely." The Court of Appeals has thus construed the indictment to charge bribery in order to create a means to facilitate its finding that Brumley did more than merely violate a less significant law than *Sawyer* presented. *En banc* Opinion, App. 54a. This post-trial construction of the indictment is erroneous because it offends traditional due process requirements of notice. The matters heretofore raised in *Brumley I*, *Brumley II*, and *Brumley III* are without moment if the Court of Appeals amends the indictment to charge bribery. Brumley need not

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[9]The variance issue surfaced for the first time in the Fifth Circuit's *en banc* decision. Throughout this prosecution Brumley repeatedly challenged the "bribery and Hobbs Act" deficiency in the indictment.

belabor the wealth of judicial precedent to the effect that the Court of Appeals cannot constructively amend the indictment. *United States v. Powell*, 423 U.S. 87 (1975). In this case, the indictment specifically gave notice that Brumley was being charged only with the appearance of conflicts of interest and violating § 36.08(e) of the Texas Penal Code. The indictment never uses the word "exchange" and gives no hint of bribery. When the government dropped the Hobbs Act count in the Superseding Indictment, Brumley waived a jury and contested only the allegations of conflicts of interest and money laundering because he was only on notice for conduct constituting misdemeanor ethics violations. Had Brumley been put on notice that his ambitious accusers were alleging bribery rather than conflicts of interest, he would not have waived a jury and he would have defended this case on the basis that there is absolutely no connection between the money that he borrowed from personal friends and the type of services that he dispensed as part of his job duties. This Court has never allowed a conviction to be affirmed on grounds outside the scope of the indictment or proof. *See, e.g., Cole v. Arkansas*, 333 U.S. 196 (1948) (reversing conviction because appellate court affirmed on grounds outside the scope of the indictment); *McCormick v. United States*, 500 U.S. 257 (1991) (reversing appellate court's affirmance of a Hobbs Act conviction because court of appeals' theory exceeded the scope of the indictment). The variance question is accentuated by this Court's holding that a passive acceptance of a benefit is sufficient to form the basis of a Hobbs Act conviction. *Evans v. United States*, 504 U.S. 255 (1992). By dropping the Hobbs Act count the government gave Brumley the security that he was only accused of violating a state conflict of interest misdemeanor statute. This security was wrongfully taken away by the *en banc* decision of the Fifth Circuit Court of Appeals.

G. The Conflict Among The Circuits Should Be Resolved.

Post-§ 1346 decisions continue the pre-*McNally* trend of inconsistently defining what constitutes a deprivation of honest services under the mail and wire fraud statutes. Brumley's case gives this Court the opportunity to address all aspects of the honest service conundrum and resolve the conflict of circuits.

1. The First Circuit.

The First Circuit's construction of § 1346 is in conflict with the Fifth Circuit and would deem the appearance of a conflict of interest and

concomitant misdemeanor ethics violation insufficient to constitute a deprivation of honest services conviction under § 1346. *United States v. Sawyer*, *supra*; *United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997) (reversing convictions under §§ 1343 and 1346 because although unauthorized browsing of taxpayer files by an IRS employee constitutes a breach of personnel policies, "there [was] no suggestion that he failed to carry out his official tasks adequately, or intended to do so").

2. The Eighth Circuit.

In applying the law to the instant facts, the Fifth Circuit references Brumley's aid to Cely in the context of an IAB investigation and an IAB lease. Neither of these IAB functions were directly or indirectly under Brumley's control. In the IAB investigation of Cely, Brumley, in his capacity as administrative judge, ruled against Cely in the matter of deductions. In the matter of the IAB lease, the record is clear that Brumley had no authority whatsoever to consummate the lease or to make any recommendations concerning the lease. Pre-*McNally* and presumably post § 1346 law in the Eighth Circuit would conflict in principle with the Fifth Circuit's application of § 1346 because Brumley's official capacity did not give him control over the investigation or the lease. *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979). Other than his loan arrangements, Brumley's work was exemplary. Under these circumstances, the Eighth Circuit would find that there was no deprivation of honest services because a citizen's right to these services is limited to the state employee's job performance. *United States v. McNeive*, 536 F.2d 1245 (8th Cir. 1976).

3. Other Circuits.

Recent § 1346 case law in the other circuits unanimously present the derogation of at least an intangible property right and go on to encompass conduct which even includes bribery. *United States v. Castro*, 89 F.3d 1443 (11th Cir. 1996) (bribery); *United States v. Paradies*, 98 F.3d 1266 (11th Cir. 1996) (self dealing concerning concession rights); *United States v. Bryan*, 58 F.3d 933, 940 n.1 (4th Cir. 1995) (state lottery director profiting off insider information); *United States v. Waymer*, 55 F.3d 564, 568 n.3 (11th Cir. 1995), *cert. denied*, 116 S.Ct. 1350 (1996) (member of state board profiting from private sector contract with state board); *United States v. Alkens*, 925 F.2d 541, 548 (2d Cir. 1991) (Department of Motor Vehicles employees selling vehicle certificates); and

United States v. Martinez, 905 F.2d 709, 715 (3d Cir.), *cert. denied*, 498 U.S. 1017 (1990) (state employee fraudulently procuring a medical license). The minimal thrust of these cases indicate some degree of job related self dealing resulting in a profit is required to violate § 1346. *Brumley* does not even register on the deprivation scale presented by these cases and as such stands apart and conflicts in principle with this ever-increasing body of § 1346 law because Brumley's conduct was outside the scope of his state duties and offended only an ethereal right related to the "appearance" of government.

The conflicts in principle between the enumerated circuits and the Fifth Circuit stem from the questions raised by § 1346's literal wording: Can the mail and wire fraud statutes criminalize conduct which only offends the concept of a citizen's ethereal right to have his state government appear free of conflicts of interest and, if so, does the Tenth Amendment provide a clear line of demarcation beyond which § 1346's reach is constitutionally prohibited? Until this Court answers these questions, conflicts among the circuits will continue due to § 1346's nebulous language.

II. THE FIFTH CIRCUIT COURT OF APPEALS' DECISION THAT § 1346 CRIMINALIZES THE MISCONDUCT BY A STATE EMPLOYEE IN CIRCUMSTANCES WHERE THE MISCONDUCT DOES NOT CAUSE THE STATE NOR ANY ENTITY OR PERSON A TANGIBLE OR INTANGIBLE LOSS OR GAIN IS INCONSISTENT WITH THE TENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND IS CONTRARY TO THIS COURT'S ANALYSIS OF CONGRESS' COMMERCE CLAUSE POWER IN *UNITED STATES V. LOPEZ*.[10]

A. The Tenth Amendment.

> **The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.** Amend. 10, U.S. Constitution.

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[10]115 S.Ct. 1624 (1995).

> **"The tension inherent in federal criminalization of conduct by state officials innocent under state law is absent here."**
> *En banc* Opinion, App. 55a.

The Fifth Circuit errs in finding no tension in their decision. This case is fraught with tension caused by unintended and disparate punishment by the Federal Government for purely state-related conduct. This was a selective prosecution wherein a federal prosecutor chose to federalize misdemeanor conduct by virtue of an uninvolved third party's incidental use of interstate wires.[11] Brumley's employee file disclosed him to be an exemplary worker. Thousands of pages of exhibits disclose that Cely did not steal any money or derive an unfair gain from any workers' compensation case involving Brumley. The proof shows only that Brumley failed his employer solely by his "acceptance of benefits" and his failure to disclose the loans from the various attorneys. For this conduct, the State of Texas had in place the following punishment: 1) Brumley could be subject to a misdemeanor; and 2) Brumley could be terminated from his job. Instead of this contemplated and clearly apparent penalty, the Court of Appeals' decision will result in Brumley being sentenced to 48 months in a Federal penitentiary.

If Brumley is a criminal, he is a criminal only to the extent that the appearance of his conduct was unacceptable to the State of Texas as his employer. Since his employer was a sovereign it had the inherent power to criminalize his conduct; and, as his sovereign and by virtue of the Tenth Amendment, it should have the sole remedy for this "victimless" ethics crime. There is no supreme reason for the Federal Government to levy extraordinary federal punishment on a person whose crime is defined solely by a state and pertains only to employees of that state in a situation where no citizen of any state has been adversely affected. *United States v. Constantine*, 296 U.S. 223 (1935).

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[11]The instant case suggests that this Court should reconsider the reach of the wire fraud statute at least insofar as it utilizes § 1346. In order to trigger federal jurisdiction in § 1346 cases, circumstances should disclose wire fraud and not fraud and incidental use of the wires. *See*, Scalia, J. dissenting, *Schmuck v. United States*, 489 U.S. 705, 722-723 (1989).

B. *United States v. Lopez.*

In 1995, this Court struck down 18 U.S.C. § 922(g) (the Gun Free School Zone Act) on the grounds that the statute constituted an unconstitutional extension of Congress' Commerce Clause authority. *United States v. Lopez*, 115 S.Ct. 1624 (1995). In *Lopez*, the Court reasoned that a fundamental component of the statute failed to substantially affect interstate commerce. *Lopez* at 1933. Even though § 1346 contains a jurisdictional element, honest services-premised prosecutions of state officials pursuant to § 1346 are within *Lopez*'s rationale. This Court, in *Lopez*, held that Congress' Commerce Clause authority creates three avenues by which the authority may be utilized. In identifying when Congress may utilize its power under the Commerce Clause, the *Lopez* court stated:

> Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power ... First, Congress may regulate the use of the channels of interstate commerce ... Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce or persons or things in interstate commerce, even though the threat may come only from intrastate activities ... Finally, Congress' commerce authority includes the power to regulate those activities having substantial relation to interstate commerce.

Lopez, 115 S.Ct. at 1629-30. The court concluded that within the final category the "proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Id.* at 1630.

Brumley now brings to this Court a Commerce Clause-based criminal statute more far reaching than the Gun Free School Zone Act. In *Brumley*, § 1346 comes to this Court heretofore without, but direly needing, the constitutional scrutiny afforded 18 U.S.C. § 922 in *Lopez*. A *Lopez*-centered analysis of *Brumley* would: 1) Reveal that the evidence was legally insufficient to prove that Brumley could foresee the interstate character of the wire transmission relied upon by the government (*Brumley I*); 2) Reveal that Brumley's case does not involve the regulation or protection of any instrumentalities in interstate commerce; and 3) Question whether Brumley's conduct had <u>any</u> affect on interstate commerce.

In *Lopez*, this Court concluded that within this important third avenue the proper test requires a case by case analysis of whether the activity in question substantially affects interstate commerce. The government's conviction in *Brumley* is not based on any economic loss nor does it establish any impact on interstate commerce other than microscopically revealing a happenstance wire transfer. More importantly, the government attempts to use § 1346 in circumstances where it did not charge and could not prove bribery or Hobbs Act. This is inconsistent with *Lopez*. Brumley's central issue is and has always been that his services were correct and proper and there was absolutely no proof that one person gained or lost any tangible or intangible right as a result of his work.[12] There is no way to reconcile the government's failure to prove any loss to anybody with the *Lopez* requirement that the conduct criminalized under the Commerce Clause must have some substantial affect on interstate commerce.

C. And The Eighth Amendment.

> **... nor cruel and unusual punishments inflicted.** Amend. 8, U.S. Constitution.

The punishment mandated by the Sentencing Guidelines usurps the State of Texas' sole right to punish and its citizens' sole right to be punished by the state in circumstances where the criminal conduct results solely from a breach of an ethical duty by a state employee to the state. Brumley's punishment is cruel and unusual, and goes far beyond anything contemplated by the State of Texas; as such, it violates the Eighth Amendment.

D. And Even The Ninth Amendment.

> **The enumeration in the Construction, of certain rights, shall not be construed to deny or disparage others retained by the people.** Amend. 9, U.S. Constitution.

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[12]Brumley attempted to offer into evidence the personnel files of three other TWCC Associate Regional Directors in order to show that Brumley's work was exemplary in comparison to the other IAB employees in like positions. The trial court sustained the government's objection on grounds of relevancy. R. XV, 1636-1640.

There is no specific power enumerated by the Constitution which allows it to punish the citizen of a state more severely than the state contemplated if that citizen has not directly or indirectly harmed or intruded upon any aspect of the Federal Government. The Federal Government should not disparage Brumley's right to be punished solely under the laws of his state for conduct which occurred exclusively within the provence of his state and offended only his legal duty to his state.

SUMMARY

McNally limited the scope of the mail and wire fraud statutes. To a certain extent, *McNally* heeded Judge Winter's influential dissent criticizing the apparent limitless application of these statutes. *United States v. Margiotta*, 688 F.2d 108, 139-144 (2d Cir. 1982), *reh. denied*, 811 F.2d 46 (1982). *Carpenter*'s subsequent recognition that the wire fraud statute reaches intangible property rights allows the concept of fraud under the mail fraud and wire fraud statutes to extend to its commonly understood limit. This Court need only look to its decisions in *Bass*, *Ashcroft*, and *Lopez* in order to strike down § 1346's application to purely ethereal right. In doing so, no harm should occur to the Federal Government's anti-corruption efforts because in *Carpenter* this Court has construed the wire fraud statute to reach any scheme involving tangible or intangible property. A citizen's ethereal right to have his state government appear correct should, by virtue of the internal limitations of the wire fraud statute and the external limitation of the Tenth Amendment, be left solely to the states.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Michael Bryant BRUMLEY,
Defendant-Appellant,

No. 94-40560.

United States Court of Appeals,
Fifth Circuit.

July 18, 1995.

Defendant was convicted after bench trial of wire fraud, money laundering, and conspiracy to commit mail fraud and wire fraud by the United States District Court for the Eastern District of Texas, Richard A. Schell, Chief Judge. Defendant appealed. The Court of Appeals, DeMoss, Circuit Judge, held that: (1) evidence was insufficient to support wire fraud conviction; (2) evidence was insufficient to support conspiracy to commit mail fraud and wire fraud conviction; and (3) evidence was insufficient to support money laundering conviction.

Reversed in part and affirmed in part.

1. Telecommunications Key 362

Essential elements of wire fraud are scheme to defraud, and use of, or causing use of, interstate wire communications to execute scheme. 18 U.S.C.A. § 1343.

2. Statutes Key 223.2(8)

Wire fraud statute and mail fraud statute are in pari materia, that is, they are to be read together, as wire fraud statute was patterned

after mail fraud statute; thus, cases construing mail fraud statute are applicable to wire fraud. 18 U.S.C.A. §§ 1341, 1343.

3. Telecommunications Key 362

In order to prove that defendant has used or caused the use of interstate wire communications, for purposes of prosecution for wire fraud, government must show that defendant knew, or that it was foreseeable to him that, interstate wire communication would result. 18 U.S.C.A. § 1343.

4. Telecommunications Key 362

In order for wire fraud conviction to stand, it must be foreseeable to defendant that his action will result in interstate wire communication. 18 U.S.C.A. § 1343.

5. Telecommunications Key 362

When defendant in one state calls someone whom he knows is in another state, interstate wire communication was clearly foreseeable for purposes of wire fraud prosecution. 18 U.S.C.A. § 1343.

6. Telecommunications Key 362

Government must show that it was foreseeable to defendant that his actions would cause interstate wire communication, in wire fraud prosecution, where individual does not personally communicate, but instead causes another to communicate via interstate wires, as foreseeability is not necessarily readily apparent. 18 U.S.C.A. § 1343.

7. Telecommunications Key 363

Evidence was insufficient to convict defendant of wire fraud; trier of fact could not have found beyond reasonable doubt that it was foreseeable to defendant or unindicted coconspirator that their actions would cause interstate wire communications. 18 U.S.C.A. § 1343.

8. Criminal Law Key 260.11(4)

In bench trial, standard of review is substantial evidence test.

9. Criminal Law Key 1044.1(7)

Defendant preserved error on his claim that evidence was insufficient to convict him of wire fraud, where he moved for directed verdict at close of government's case, which was also close of evidence. 18 U.S.C.A. § 1343.

10. Conspiracy Key 41

If one conspirator makes wire communication to execute scheme, then all conspirators are liable for wire fraud. 18 U.S.C.A. § 1343.

11. Telecommunications Key 362

In determining knowledge and foreseeability relative to defendant, for purposes of wire fraud prosecution, court also had to consider whether interstate wire communication was foreseeable to unindicted coconspirator, even though coconspirator was not indicted, where indictment charged that conspiracy was between defendant and unindicted coconspirator. 18 U.S.C.A. § 1343.

12. Conspiracy Key 47(5)

Evidence was insufficient to convict defendant of conspiracy to commit mail fraud and wire fraud; evidence did not prove that use of interstate wire communications or mails was foreseeable, and thus was insufficient to prove that defendant intended to commit mail fraud and wire fraud. 18 U.S.C.A. § 371.

13. Conspiracy Key 32

Essential elements of conspiracy to commit mail fraud and wire fraud are: agreement between two or more persons; to commit interstate mail fraud or wire fraud; and overt act committed by one of conspirators in furtherance of conspiracy. 18 U.S.C.A. § 371.

14. Telecommunications Key 362

Specific intent to use interstate wires is not required for wire fraud conviction; interstate wire communication need only be foreseeable. 18 U.S.C.A. § 1343.

15. Postal Service Key 35(6)

For mail fraud conviction, use of mails need only be foreseeable. 18 U.S.C.A. § 1341.

16. Conspiracy Key 32

Government's burden, in prosecution for conspiracy to commit mail fraud and wire fraud, is to demonstrate beyond reasonable doubt that defendant agreed to engage in scheme to defraud in which use of mail and interstate wire communications was at least foreseeable. 18 U.S.C.A. § 371.

17. Postal Service Key 49(11)

Evidence was insufficient to support defendant's conviction for mail fraud; rational trier of fact could not have determined beyond reasonable doubt that it was foreseeable to defendant that mails would be used to execute scheme. 18 U.S.C.A. § 1341.

18. Telecommunications Key 363

Evidence was insufficient to support defendant's convictions of money laundering based on underlying specified unlawful activity of wire fraud; evidence was insufficient to support wire fraud conviction. 18 U.S.C.A. §§ 1343, 1956.

George Michael Jamail, Bernsen, Jamail, Hartley & Goodson, Beaumont, TX, for appellant.

Traci L. Kenner, Carol K. Johnson, L. Stuart Platt, Asst. U.S. Attys, Tyler, TX, Mike Bradford, U.S. Atty., Beaumont, TX, for appellee.

Appeal from the United States District Court for the Eastern District of Texas.

Before WOOD,[1] JOLLY and DeMOSS, Circuit Judges.

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1. Circuit Judge of the Seventh Circuit, sitting by designation.

DeMOSS, Circuit Judge.

Michael Brumley appeals his conviction at a bench trial on three counts of wire fraud, three counts of money laundering and one count of conspiracy to commit mail fraud and wire fraud. Brumley does not appeal his conviction on two counts of making false statements to a financial institution, but he appeals his sentence. Finding that there was insufficient evidence to convict Brumley of wire fraud, money laundering and conspiracy to commit mail fraud and wire fraud, we REVERSE. Brumley's sentence of twenty-four months for two counts of making false statements to a financial institution is AFFIRMED.

BACKGROUND

Brumley began working for the Texas Industrial Accident Board (IAB) in July, 1976, as a pre-hearing examiner. In July 1988 he was promoted to the position of regional director for the Houston area. As part of the state's new workers' compensation law, the IAB was reorganized in 1990 as the Texas Workers' Compensation Commission (TWCC) and Brumley was appointed the TWCC's regional associate director (essentially the same position he had held with the IAB). Beginning in 1982, Brumley solicited and accepted approximately $40,000 in loans from local attorneys, which he admitted was a violation of IAB ethical guidelines.

Between 1987 and 1992, Brumley also accepted over $86,000 in "loans" via wire transfers from another local attorney, John Cely. Although Cely understood that the money would never be repaid, he continued to make loans to Brumley. Cely wired the money from the Western Union office in Lufkin, Texas, to Brumley in Beaumont, Texas.

The procedure for making the Western Union wire transfers involved Cely, or one of his employees, filling out a form listing the

recipient and the amount of the transfer. Cely paid for the wire transfer with checks payable to H.C. Walker, the Lufkin Western Union franchisee. The Western Union agent, then, through a personal computer, dialed into Western Union's main computer in Bridgeton, Missouri. The Western Union agent would write a unique ten-digit number, which he obtained through the computer in Missouri, on the back of the form he gave to Cely. This would serve as the receipt. Brumley was then immediately able to pick up the money.

After being notified that a money transfer was waiting for him, Brumley would go to a Western Union office in Beaumont to pick up the transfer. He would fill out a form identifying himself as the recipient and the Beaumont Western Union agent would call the Western Union computer in Bridgeton, Missouri, to verify the information. Brumley was then given a check for the amount of the transfer, which he would cash at either a bank or a grocery store.

In 1988, pursuant to a complaint from one of Cely's clients, the IAB began an investigation into Cely's law practice. Brumley on several occasions urged the IAB to reconsider its decision to formally investigate Cely, and Brumley assisted Cely in altering subpoenaed documents. Finally, Brumley aided Cely's efforts to lease TWCC property in Lufkin. The lease, if it had been consummated, would have violated ethical guidelines, as Cely practiced before the TWCC. Nevertheless, Brumley directed that the building specifications be faxed to Cely's office in the name of one of Cely's clients, James Fredregill. A TWCC employee later mailed the lease specifications to Fredregill. The property was ultimately leased to a disinterested party.

Michael Brumley was indicted in November 1993 for conspiracy to defraud the citizens of the state of Texas of the honest use of his services via mail and wire communications (18 U.S.C. § 371), wire fraud (18 U.S.C. §§ 1343, 1346), money laundering 18 U.S.C. § 1956) and making false statements to a financial institution (18 U.S.C. § 1014).

At the conclusion of the bench trial, the district court convicted Brumley on all nine counts in the indictment and he was sentenced to forty-eight months in prison.[2] Brumley now appeals.

WIRE FRAUD

[1-3] The essential elements of wire fraud, 18 U.S.C. § 1343[3], are: (1) a scheme to defraud and (2) the use of, or causing the use of, interstate wire communications to execute the scheme. *United States v. Faulkner,* 17 F.3d 745, 771 (5th Cir.1994), *cert. denied, —U.S.—,* 115 S.Ct. 193, 130 L.Ed.2d 125 (1995); *United States v. Herron,* 825 F.2d 50,54 (5th Cir.1987).[4] In order to prove that a defendant has used, or caused the use of, interstate wire communications, the government must show that the defendant knew, or that it was foreseeable to him that, an interstate wire communication would result. "Where one does an act with the knowledge that the use of the [interstate wires] will

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2. Brumley was sentenced to twenty-four months in prison for each of the two counts of making false statements to a financial institution, to be served concurrently. Brumley does not appeal those convictions (they are the only ones we do not reverse). Brumley does, however, challenge his sentence.

3. 18 U.S.C. § 1343 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false of fraudulent pretenses, representations, or promises, *transmits or causes to be transmitted* by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. (emphasis added).

4. The mail fraud. 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343, statutes are nearly identical, with the main difference being whether the fraud involves the mails of interstate wires. Because the wire fraud statute was patterned after the mail fraud statute, the two are *in pari materia,* that is, they are to be read together. Therefore, cases construing the mail fraud statute are applicable to wire fraud. *United States v. Donahue,* 539 F.2d 1131, 1135 (8th Cir. 1976); *United States v. Louderman,* 576 F.2d 1383, 1387 n. 3 (9th Cir. 1978); *United States v. Computer Sciences Corp., 689 F.2d 1181, 1188 n. 14 (4th Cir.1982); United States v. Lemire,* 720 F.2d 1327, 1334 n. 6 (D.C.Cir.1983), *cert. denied,* 467 U.S. 1226, 104 S.Ct. 2678, 81 L.Ed.2d 874 (1984); *United States v. Fermin Castillo,* 829 F.2d 1194, 1198 (2st Cir. 1987).

follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the [interstate wires] to be used." *Pereira v. United States*, 347 U.S. 1, 8-9, 74 S.Ct. 358, 363, 98 L.Ed. 435 (1954).

[4-6] In order for a wire fraud conviction to stand, then, it must be foreseeable to the defendant that his actions will result in an interstate wire communication. When a defendant in one state calls someone whom he knows is in another state, an interstate wire communication is clearly foreseeable. However, when the individual does not personally communicate, but instead causes *another* to communicate via interstate wires, foreseeability is not always so readily apparent. In such a case, therefore, the government must show that it was foreseeable to the defendant that his actions would cause an interstate wire communication. *United States v. Maze*, 414 U.S. 395, 399, 94 S.Ct. 645, 648, 38 L.Ed.2d 603 (1974); *Pereira v. United States*, 347 U.S. 1, 8-9, 74 S.Ct. 358, 362-63, 98 L.Ed. 435 (1954).[5]

[7-9] On appeal, Brumley argues that the evidence was insufficient to convict him of wire fraud, as there was insufficient evidence that he *caused* the interstate wire communication.[6] We agree. In

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5. Two other circuits have held that the foreseeability of the interstate nature of the wire communication is irrelevant (at least where the defendant actually makes the communication). *United States v. Bryant*, 766 F.2d 370, 375 (8th Cir.1985), *cert. denied*, 474 U.S. 1054, 106 S.Ct. 790, 88 L.Ed.2d 768 (1986); *United States v. Blassingame*, 427 F.2d 329, 331 (2d Cir. 1970), *cert. denied*, 402 U.S. 945, 91 S.Ct. 1629, 29 L.Ed.2d 114 (1971). However, these cases are contrary to our existing precedent, which requires foreseeability. *United States v. Duncan*, 919 F.2d 981, 991 (5th Cir.1990), *cert. denied*, 500 U.S. 926, 111 S. Ct 2036, 114 L.Ed.2d 121 (1991); *United States v. Toney*, 598 F.2d 1349, 1355 (5th Cir. 1979), *cert. denied*, 444 U.S. 1033, 100 S.Ct. 706, 62 L.Ed.2d 670 (1980); *R.A.G.S. Couture, Inc. v. Hyatt*, 744 F.2d 1350, 1354 (5th Cir. 1985); *Snyder*, 505 F.2d at 601; *United States v. Shryock*, 537 F.2d 207, 209 (5th Cir. 1976), *cert. denied*, 429 U.S. 1100, 97 S.Ct. 1123, 51 L.Ed.2d 549 (1977).

6. Brumley preserved error on his insufficiency of the evidence claims; he moved for a directed verdict at the close of the government's case, which was also the close of evidence. *United States v. Pierre*, 958 F.2d 1304, 1310 (5th Cir. 1992) (en banc).

a bench trial, the standard of review is a substantial evidence test. *United States v. Cardenas*, 9 F.3d 1139, 1156 (5th Cir.1993), *cert. denied*, — U.S.—, 114 S.Ct. 2150, 128 L.Ed.2d 876 (1994).

> [I]n reviewing the findings of guilt by a trial court in a non-jury trial, the standard of review of the appellate court "is to determine whether such findings are supported by any substantial evidence. It is not our function to make credibility choices or to pass upon the weight of the evidence. The test is whether the evidence is sufficient to justify the trial judge, as trier of the facts, in concluding beyond a reasonable doubt that the defendant was guilty."

Cardenas, 9 F.3d at 1156 (quoting *United States v. Jennings*, 726 F.2d 189, 190 (5th Cir.1984)).

[10,11] Neither Brumley nor Cely[7] actually communicated with each other via interstate wires. The only interstate wire communications in the record were those made by the Western Union agents in Lufkin, Texas and Beaumont, Texas to the Western Union computer in Missouri. In order to determine whether Brumley or Cely *caused* an interstate wire communication, the issue is whether it was foreseeable to them that their actions would cause the Western Union agents' interstate wire communications.

At trial, and on appeal, the government mistakenly believed that foreseeability and knowledge of the interstate nature of the wire communication were not elements of wire fraud.[8] Therefore, the government did not seek to put on evidence showing foreseeability. In fact, when Brumley's attorney attempted to question Western Union's

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7. The indictment charged that the conspiracy was between Brumley and Cely although Cely was an unindicted co-conspirator. If one conspirator makes a wire communication to execute a scheme, then all conspirators are liable for wire fraud. *United States v. Toney*, 598 F.2d 1349, 1355 (5th Cir.1979). Therefore, in determining knowledge and foreseeability relative to Brumley, we must also consider whether the interstate wire communication by Western Union was foreseeable to Cely.

8. We note that the government cites only Second and Eighth Circuit cases and ignores all of our foreseeability precedent.

representative about foreseeability, the government objected, arguing that the foreseeability of interstate communications was not an element of the offense and therefore not relevant.

Even though the government did not consider knowledge or foreseeability to be matters it needed to prove at trial, we have examined the record to determine whether, nevertheless, there was sufficient evidence to allow the trial judge to determine that it was foreseeable to Brumley or Cely that their actions would cause the Western Union agents' interstate wire communications. The only evidence in the record that could even inferentially show knowledge or foreseeability is: (1) Western Union is an international company with many agents throughout the United States and (2) the form Cely used in Lufkin, Texas, to initiate the sending of the money to Brumley listed, on the back, a Western Union corporate address in New Jersey.

Cely testified as a government witness. Nowhere in his testimony does Cely say, or imply, that he knew, or that it was foreseeable to him, that his actions could result in an interstate wire communication.

The only evidence that even attempted to address the foreseeability. When asked on cross-examination by Brumley's attorney whether a wire transfer customer would be aware of Western Union's interstate computer system, the Western Union representative responded, "I can't answer that."

These facts, taken together, do not constitute notice that a wire transfer of money from Lufkin, Texas, to Beaumont, Texas, will involve an interstate wire communication. There is not sufficient evidence in this record upon which a trier of fact could find *beyond a reasonable doubt* that it was foreseeable to Brumley or Cely that their actions would cause the Western Union agents to make interstate wire communications. Because use of interstate wire communications is an essential element of the offense, *Herron,* 825 F.2d at 54; *Faulkner,* 17 F.3d at 771, the evidence at trial was insufficient for the court to find Brumley guilty of wire fraud.

CONSPIRACY TO COMMIT MAIL FRAUD AND WIRE FRAUD

[12] Brumley was convicted of one count of conspiracy to commit mail fraud and wire fraud. Brumley argues on appeal that the evidence was insufficient to convict him. We agree.

[13] The essential elements of conspiracy to commit mail fraud and wire fraud, 18 U.S.C. § 371, are: (1) an agreement between two or more persons; (2) to commit interstate mail fraud or wire fraud; and (3) an overt act committed by one of the conspirators in furtherance of the conspiracy. *United States v. Hatch,* 926 F.2d 387, 393 (5th Cir.), *cert. denied,* 500 U.S. 943, 111 S.Ct. 2239, 114 L.Ed.2d 481 (1991); *United States v. Massey,* 827 F.2d 995, 1001 (5th Cir.1987); and *United States v. Gordon,* 780 F.2d 1165, 1170 (5th Cir.1986). "Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense.'" *Massey,* 827 F.2d at 1001 (quoting *Ingram v. United States,* 360 U.S. 672, 678, 79 S.Ct. 1314, 1319, 3 L.Ed2d 1503 (1959)).

[14-16] Specific intent to use interstate wires is not required for wire fraud; interstate wire communication need only be foreseeable. Likewise, for mail fraud, the use of the mails need only be foreseeable. The government's burden, therefore, is to demonstrate beyond a reasonable doubt that Brumley agreed to engage in a scheme to defraud in which the use of the mail and interstate wire communications was at least foreseeable. *Massey* 827 F.2d at 1002.

For the reasons previously stated, the evidence at trial was insufficient to prove that the use of interstate wire communications was foreseeable. Therefore, the evidence was insufficient to prove Brumley intended to commit wire fraud, an essential element of conspiracy to commit wire fraud.

[17] The evidence in the record is insufficient to show that Brumley and Cely conspired to commit mail fraud. The only testimony at trial concerning mailings was that of Alvin Little, an employee

of the TWCC. Little testified that Brumley mentioned to him that Fredregill, a client of Cely[9], was interested in bidding for the TWCC lease in Lufkin, Texas. Later, when the lease specifications came out, Little mailed Fredregill a copy. This evidence is insufficient to allow a rational finder of fact to determine *beyond a reasonable doubt* that it was foreseeable to Brumley that the mails would be used to execute a scheme. *See United States v. Walters*, 997 F.2d 1219, 1223 (7th Cir.1993).

Because the evidence was insufficient to prove that Brumley intended to commit mail fraud or wire fraud, we reverse his conviction for conspiracy to commit mail fraud and wire fraud.

MONEY LAUNDERING

[18] Brumley appeals his money laundering convictions on sufficiency of the evidence grounds, arguing that the evidence was insufficient to establish the underlying specified unlawful activity of wire fraud. We agree.

The money laundering statute, 18 U.S.C. § 1956, requires a financial transaction involving the proceeds of a specified unlawful activity. "Specified unlawful activity" is defined in 18 U.S.C. § 1956(c)(7)(A) to include any racketeering offense listed in 18 U.S.C. § 1961(1). One of the racketeering offenses identified in 18 U.S.C. § 1961(1) is wire fraud, 18 U.S.C. § 1343.

Brumley's three money laundering convictions were based on the specified unlawful activity of wire fraud. The wire frauds alleged in the money laundering counts are the same as those in the wire fraud counts. Therefore, for the reasons previously stated, the money laundering convictions are reversed because of insufficient evidence.

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9. Little did not know that Fredregill was Cely's client.

SENTENCING

Brumley raises two issues related to sentencing. However, these issues do not concern the false statements to a financial institution counts; they only concern the wire fraud, money laundering and conspiracy to commit mail fraud and wire fraud counts. As those counts have been reversed, we need not consider Brumley's sentencing issues. Therefore, Brumley's sentence of twenty-four months for two counts of making false statements to a financial institution is affirmed.

CONCLUSION

The evidence at trial was insufficient to prove that it was foreseeable to Brumley that his actions in receiving the Western Union wire transfer would cause an interstate wire communication. Because the defendant's use of interstate wire communications is an essential element of the offense of wire fraud, the evidence was insufficient to prove Brumley committed wire fraud. The evidence was likewise insufficient to prove Brumley conspired to commit wire fraud. Brumley's money laundering convictions were based on the underlying specified unlawful activity of wire fraud. Because the evidence was insufficient to convict Brumley of the underlying wire fraud, it was also insufficient to convict him of money laundering.

For the foregoing reasons, Brumley's convictions for wire fraud, money laundering and conspiracy to commit wire fraud are REVERSED. Brumley's sentence of twenty-four months for the two counts of making false statements to a financial institution is AFFIRMED.

APPENDIX B

UNITED STATES of America
Plaintiff-Appellee,

v.

Michael Bryant BRUMLEY,
Defendant-Appellant.

No. 94-40560

United States Court of Appeals,
Fifth Circuit.

March 28, 1996.

Following bench trial before the United States District Court for the Eastern District of Texas, Richard A. Schell, Chief Judge, defendant was convicted of wire fraud, money laundering and one count of conspiracy to commit mail fraud and wire fraud as well as making false financial statements to financial institution. Defendant appealed. On rehearing, superseding and withdrawing opinion at 59 F.3d 517, the Court of Appeals, DeMoss, Circuit Judge, held that: (1) statute defining term scheme or artifice to defraud as including scheme to deprive another of "intangible right to honest services" did not clearly reach conduct of state government officials in depriving citizens of right to good and faithful service, and (2) accordingly, convictions of wire fraud, conspiracy and money laundering were defective.

Affirmed in part; vacated in part and remanded.

Harlington Wood, Jr., Circuit Judge, filed dissenting opinion.

1. Statutes Key 188

In determining statute's plain meaning, Court of Appeals assumes that, absent any contrary definition, Congress intends words in

its enactments to carry their ordinary, contemporary, common meaning.

2. Statutes Key 199

Term "whoever" as used in mail and wire fraud statutes cannot be construed under rules of construction as referring to state, political subdivision of state, government, government agency, or citizens of state as body politic. 1 U.S.C.A. § 1; 18 U.S.C.A. §§ 1341, 1343.

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law Key 13.1(1)

In case of criminal statute which Supreme Court has previously held does not extend to or reach conduct which Congress may want to make criminal, burden is on Congress to amend statute so that it speaks more clearly than it has, gives fair warning to world in language the common world will understand that crime will be committed if certain line is passed, and in area of sensitive relation between federal and state criminal jurisdiction, makes clear statement which assures legislature has in fact faced critical matters involved.

4. Postal Service Key 35(9)
Telecommunications Key 362

Statute defining term scheme or artifice to defraud as including scheme to deprive another of "intangible right of honest services" does not reach conduct of state government officials in depriving citizens of intangible right to good and faithful service, so as to form basis for mail or wire fraud prosecution; Congress did not clearly and expressly state in statute intent to put federal government in business of setting standards of disclosure and good government for local and state officials. 18 U.S.C.A. §§ 1341, 1343, 1346.

5. Conspiracy Key 32
Postal Service Key 35(9)
Telecommunications Key 362

State workers' compensation official's conduct in accepting

loans from attorney who practiced before compensation commission was not subject to prosecution under mail fraud, wire fraud or conspiracy statutes where statute defining requisite scheme or artifice to defraud did not contain requisite clarity in extending scope of statutes to "intangible right of honest services" to reach conduct of government officials in depriving citizens of intangible right to good and faithful service. 18 U.S.C.A. §§ 371, 1341, 1343, 1346.

6. United States Key 34

Where money laundering counts against defendant made cross reference to wire fraud counts as specified unlawful activity and identified same wire transfers named in wire fraud counts as transactions producing proceeds of specific unlawful activity, conviction under money laundering counts could not stand where wire fraud statute did not extend to conduct of state officials in depriving state citizens thereof of honest services and good government. 18 U.S.C.A. §§ 1343, 1346, 1956.

George Michael Jamail, Bernsen, Jamail, Hartley & Goodson, Beaumont, TX, for appellant.

Traci L. Kenner, Carol K. Johnson, L. Stuart Platt, Asst. U.S. Attys., Tyler, TX, Mike Bradford, U.S. Atty., Beaumont, TX, for appellee.

Appeal from the United States District Court for the Eastern District of Texas.

Before WOOD[1], JOLLY and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge,

Michael Brumley appeals his conviction at a bench trial on three counts of wire fraud, three counts of money laundering and one

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1. Circuit Judge of the Seventh Circuit, sitting by designation.

count of conspiracy to commit mail fraud and wire fraud. Brumley does not appeal his conviction on two counts of making false statements to a financial institution, but he appeals his sentence. The opinion in this case issued under date of July 18, 1995, is withdrawn. We pretermit resolution of the claim of evidentiary insufficiency by Brumley since we have concluded on rehearing that a more fundamental defect exists as to counts 1-7 of the conviction, i.e. the statutes in question (18 U.S.C. §§ 1343 and 1346)[2] do not proscribe the conduct described in these counts of the indictment. We affirm as to the two counts of making false statements to a financial institution[3] and vacate the judgment of conviction on the wire fraud, mail fraud, money laundering and conspiracy counts and remand for dismissal of the indictments as to these counts.

BACKGROUND

Brumley began working for the Texas Industrial Accident Board (IAB) in July, 1976, as a pre-hearing examiner. In July 1988 he was promoted to the position of regional director for the Houston area. As part of the state's new workers' compensation law, the IAB was reorganized in 1990 as the Texas Workers' Compensation Commission (TWCC) and Brumley was appointed the TWCC's regional associate

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2. 18 U.S.C. § 1343 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both 18 U.S.C. § 1346 provides:

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

3. Brumley was sentenced to 24 months in prison for each of the two counts of making false statements to a financial institution, to be served concurrently.

director (essentially the same position he had held with the IAB). Beginning in 1982, Brumley solicited and accepted approximately $40,000 in loans from local attorneys, which he admitted was a violation of IAB ethical guidelines.

Between 1987 and 1992, Brumley also accepted over $86,000 in "loans" via wire transfers from another local attorney, John Cely. Although Cely understood that the money would never be repaid, he continued to make loans to Brumley. Cely wired the money from the Western Union office in Lufkin, Texas, to Brumley in Beaumont, Texas.

The procedure for making the Western Union wire transfers involved Cely, or one of his employees, filling out a form listing the recipient and the amount of the transfer. Cely paid for the wire transfer with checks payable to H.C. Walker, the Lufkin Western Union franchisee. The Western Union agent then, through a personal computer, dialled into Western Union's main computer in Bridgeton, Missouri. The Western Union agent would write a unique ten-digit number, which he obtained through the computer in Missouri, on the back of the form he gave to Cely. This would serve as the receipt. Brumley was then immediately able to pick up the money.

After being notified that a money transfer was waiting for him, Brumley would go to a Western Union office in Beaumont to pick up the transfer. He would fill out a form identifying himself as the recipient and the Beaumont Western Union agent would call the Western Union computer in Bridgeton, Missouri, to verify the information. Brumley was then given a check for the amount of the transfer, which he would cash at either a bank or a grocery store.

In 1988, pursuant to a complaint from one of Cely's clients, the IAB began an investigation into Cely's law practice. Brumley on several occasions urged the IAB to reconsider its decision to formally investigate Cely, and Brumley assisted Cely in altering subpoenaed documents. Finally, Brumley aided Cely's efforts to lease TWCC property in Lufkin. The lease, if it had been consummated, would have violated ethical guidelines, as Cely practiced before the TWCC. Never-

theless, Brumley directed that the building specifications be faxed to Cely's office in the name of one of Cely's clients, James Fredregill. A TWCC employee later mailed the lease specifications to Fredregill. The property was ultimately leased to a disinterested party.

Michael Brumley was indicted in November 1993 for conspiracy to defraud the citizens of the state of Texas of the honest use of his services via mail and wire communications (18 U.S.C. § 371), wire fraud (18 U.S.C. §§ 1343, 1346), Money laundering (18 U.S.C. § 1956) and making false statements to a financial institution (18 U.S.C. § 1014). Both before and during his bench trial Brumley moved to dismiss counts 1-7 of the indictment on grounds that (1) such counts "constitute an unwarranted and impermissible federal intrusion into affairs of the Texas industrial Accident Board;" (2) the Tenth Amendment to the United States Constitution "reserves all rights to the State no specifically entrusted to the Federal Government;" and (3) that prosecution of Brumley under these counts "would violate his right of equal protection of law under the 14th Amendment" and would violate "the 7th Amendment prohibiting the infliction of cruel and unusual punishment" in that any culpable conduct under state law would only be a misdemeanor while such conduct would be punishable as a felony under the United States statutes. The trial judge overruled such motions and convicted Brumley on all nine counts in the indictment and he was sentenced to 48 months in prison. Brumley now appeals.

McNALLY AND CARPENTER

We must start with a thorough understanding of the Supreme Court's landmark decision in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L..Ed.2d 292 (1987). This case involved the prosecution of a former public official of Kentucky and a private individual for alleged violation of the federal mail fraud statute, 18 U.S.C. § 1341. The principal theory of the prosecution in *McNally*, which was accepted by the courts below, was that the defendants' participation in a self-dealing patronage scheme defrauded the citizens and government of Kentucky of certain "intangible rights," such as the right to have the commonwealth affairs conducted honestly. The jury convicted

defendants and the Court of Appeals affirmed the convictions, relying upon a line of decision from the Courts of Appeals holding that the mail fraud statute proscribe schemes to defraud citizens of their intangible rights to honest and impartial government. The Supreme Court granted certiorari and reversed. The most illuminating language of the majority opinion is that found at page 360 of 483 U.S., and the top of page 2882 of 107 S.Ct. which reads:

> Rather than construe the statute [mail fraud, § 1341] in a manner that leaves its outer boundaries ambiguous and *involves the Federal Government in setting standards of disclosure and good government for local and state officials,* we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, *it must speak more clearly than it has.* (emphasis added)

This seven to two majority opinion overturned the theories upon which a large number of prior circuit court decisions had been based. Justice Stevens' dissent identifies in detail the prior circuit court cases and categorizes them in separate footnotes as follows:

> Footnote 1, page 362-63, 107 S.Ct. page 2883
> State and federal officials convicted of defrauding citizens of their right to the honest services of their governmental officials;
>
> Footnote 2, page 363, 107 S.Ct. page 2883
> Elected officials and campaign workers convicted of mail fraud for using the mail to falsify votes, thus defrauding the citizenry of its right to an honest election;
>
> Footnote 3, page 363-64, 107 S.Ct. page 2883-84
> In the private sector, agents with clear fiduciary duty to their employers or unions, found guilty of defrauding by accepting kick backs or selling confidential information; and
>
> Footnote 4, page 364, 107 S.Ct. page 2884
> In the private sector, defendants convicted for defrauding individuals of their rights to privacy and other non-monetary rights.

The key language from *McNally* quoted above clearly states that the majority overruled the body of case law referred to in Justice Stevens' footnotes for two reasons:

> 1. The majority did not want to construe the statute as involving the federal government in setting standards of disclosure and good government for local and state officials. This is a healthy recognition of the realities of our federal system and pulls the rug out from under the conceptual analysis used by the circuit courts in deciding the cases in footnotes 1 and 2 of the dissent; and
>
> 2. The majority did not want to construe the mail fraud statute in a manner that would create ambiguity in its outer limits, so it said the statute would apply only to the "protection of property rights," thereby pulling the rug out from under the category of cases described in footnotes 3 and 4.

Both the majority opinion and the dissent in *McNally* indicate that Congress might change the Court's construction; but the majority made it absolutely clear that Congress "must speak more clearly than it has" if it desired to make such changes.

Shortly after its decision in *McNally,* the Supreme Court decided *Carpenter v. United States,* 484 U.S. 19, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987). In *Carpenter,* a unanimous Supreme Court described their holding in *McNally* as follows:

> We held in McNally that the mail fraud statute does not reach "schemes to defraud citizens of their intangible rights to honest and impartial government" and that the statute is "limited in scope to the protection of property rights."

Id. at 25, 108 S.Ct. at 320 (internal citations omitted).

In *Carpenter* the Supreme Court found that the property rights, though intangible (i.e. right of an employer to make exclusive use of confidential information generated by its employees), were none the

less property rights and that "*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights." Furthermore, in *Carpenter,* the Court characterized an employer's contractual right to an employee's honest and faithful service as "an interest too ethereal in itself to fall within the protection of the mail fraud statute." *Id.* Therefore, *Carpenter* clearly reaffirms the majority opinion in *McNally* and simply recognizes that both tangible and intangible property rights are protected by the mail fraud and wire fraud statutes.

PASSAGE OF § 1346

On the last day of the 100th Congress in October 1988, the Congress passed a highly publicized and much debated omnibus drug bill and attached to that bill, as one of some 30 unrelated provisions, was a provision containing the test of what has now been codified at 18 U.S.C. § 1346. *(See* Pub.L. 100-690, Title VII, § 7603(a), Nov. 18, 1988, 102 Stat. 4508.) The text of this provision was placed in the Omnibus Drug Bill on the same day as the ultimate passage of that bill and the legislative history of this provision is minimal. Therefore, our first task is to decide whether the language used by the Congress in § 1346 satisfies the admonition of the Supreme Court in *McNally* that Congress "speak for clearly than it has."

[1] As with any statutory question we begin with the language of the statute. Kellogg *v. United States, (In re West Texas Marketing Corp.),* 54 F.3d 1194, 1200 (5th Cir.), *cert denied,* —U.S.—, 116 S.Ct. 523, 133 L.Ed.2d 430 (1995). In determining a statute's plain meaning, we assume that, absent any contrary definition, "Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning." *Pioneer Investment Services v. Brunswick Associates,* 507 U.S. 380, 388, 113 S.Ct. 1489, 1495, 123 L.Ed.2d 74 (1993) (internal quotation marks omitted). As the Supreme Court has states: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *Griffin v. Oceanic Contractors, Inc.* 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982) (internal quotation marks omitted). If the language is clear, then "the in-

quiry should end." *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989).

[2] The statute in question is one sentence in length:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1346. The chapter referred to is Chapter 63 of Title 18 entitled "Mail Fraud" and the term "scheme or artifice to defraud" appears in four sections: *Section 1341*, Mail Fraud; *Section 1342*, Fictitious Names or Addresses; *Section 1343*, Fraud by Wire, Radio or Television; and *Section 1344*, Bank Fraud.. It should be noted that the pronoun "whoever" is the operative word used at the beginning of each of these sections. Section 1 of Title I of the United States Code relating to rules of construction, contains the following definition:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise—
> "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals; . . .

We note that among the meanings of the word "whoever" in Section 1 Title I, there is nothing that could even remotely be interpreted or construed to mean "a state," "a political subdivision of a state," " a government," "a governmental agency," or "the citizens of a state as a body politic."

So if we substitute for the pronoun "whoever" its statutory definition and if we insert the definitional language of § 1346 in § 1343 (Wire Fraud), which is the relevant section involved here in *Brumley*, the statute would read as follows:

> WHO [any person, individual, corporation, company, association, firm, partnership, society or joint stock company who], having devised or intending to devise any scheme or

artifice [to deprive *another* of the intangible right of honest services (emphasis added)]

CONDUCT transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce

WHAT any writings, signs, signals, pictures or sounds

MOTIVE for the purpose of executing such scheme or artifice; etc.

The critical question we have to answer is: To whom or what does the pronoun "another" refer? The word "another" is not defined anywhere in the United States Code. *Webster's* says that the first and most frequent use of "another" as a pronoun is "one more; an additional one."[4] But grammarians tell us that the word "another" when used as a pronoun is an indefinite pronoun which has no specific meaning but draws its meaning from the context in which it is used. A logical argument could be made, therefore, that the pronoun "another" as incorporated by § 1346 into § 1343 would have the same meaning as the pronoun "whoever." We are reluctant, however, to decide this issue on the basis of stacking one pronoun on another (no pun intended) and conclude that the language of § 1346 is not sufficiently clear on it face so as to eliminate the need for a look at the legislative history of the passage of § 1346.

LEGISLATIVE HISTORY

Recognizing that the word "another" may be sufficiently ambiguous to justify a review of the legislative history of the passage of § 1346, we turn to that task to see what light that history might shed on the issue of "to whom or what does the pronoun 'another' refer?" In undertaking this task, we have kept square in our minds (1) the admo-

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4. *Webster's Collegiate Dictionary*, Random House, 1992.

nition of the Supreme Court in *McNally* that "if Congress desires to go further, it must speak more clearly than it has" and (2) the fact that *Brumley* involves the very case of the federal government "setting standards of disclosure and good government for local and state officials" which the Supreme Court in *McNally* recognized as requiring "clear and definite language." In *McNally,* the Supreme Court cited *United States v Bass,* 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971), which states the two policies underlying the task of construing criminal statutes passed by Congress, as follows:

> A fair warning should be given to the world in language that the common world will understand of what the law intends to do if a certain line is passed. To make the warning fair so far as possible the line should be clear . . .
>
> There is a second principle supporting today's result: Unless Congress conveys it purpose clearly, it will not be deemed to have significantly changed the federal-state balance . . .
>
> As this court emphasized only last term in *Rewis v. United States* [401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971)], we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

Id. at 348-49, 92 S.Ct. at 522-23 (footnotes and cited cases omitted).

The specific text of what has become 18 U.S.C. § 1346 was inserted in the Omnibus Drug Bill on the very day that the Omnibus Drug Bill was finally passed by both the House and the Senate. The text of what is now § 1346 was never included in any bill filed in either the House of Representatives or the Senate and as a result the text of § 1346 was never referred to any committee or either the House or the Senate, was never the subject of any committee report from either the House or the Senate and was never the subject of any floor debate

reported in the Congressional Record. There are *only* two items of legislative history pertinent to the text of § 1346 as actually passed. First, there are remarks on the floor of the House entered by Representative Conyers regarding various items in the Omnibus Drug Bill including the section of that bill which would add a new § 1346 to Title 18. After describing the Supreme Court decision in *McNally* and its effect on various prior federal circuit court opinions, Representative Conyers stated:

> This amendment restores the mail fraud provision to where that provision was before the *McNally* decision. The amendment also applies to the wire fraud provision and precludes the *McNally* result with regard to that provision.
>
> The amendment adds a new section to 18 U.S.C. 63 that defines the term "scheme or artifice to defraud to include a scheme or artifice to defraud another of the intangible right of honest services." Thus, it is no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property. This amendment is intended merely to overturn the *McNally* decision. No other change in the law is intended.

134 Cong.Rec. H11, 108-01 (daily ed. Oct. 21, 1988).

Second, after the passage of the Omnibus Drug Bill, the Senate Judiciary Committee prepared and entered into the Congressional Record a report regarding all of the provisions in the Anti-Drug Abuse Act of 1988 which were within the jurisdiction of the Senate Judiciary Committee for the purpose of detailing "Congress' intent in enacting these provisions." Regarding the text of what is now 18 U.S.C. § 1346, this report states as follows:

Section 7603. Intangible Rights for Mail and Wire Fraud.

> This section overturns the decision of *McNally v. United States* in which the Supreme Court held that the mail and wire fraud statutes protect property but not intangible rights. Under the amendment, those statutes will protect any person's intangible right to the honest services of another, including the right of the public to the honest services of public officials. The intent is to reinstate all

> of the pre-*McNally* case law pertaining to the mail and wire fraud statutes without change.

134 Cong.Rec. S17,360-02 (daily ed. Nov. 10, 1988).[5]

[3,4] We find these items of legislative history unpersuasive for two reasons. First, and foremost, the Supreme Court has never attributed a great deal of significance to contemporaneous remarks of a sponsor of legislation. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118, 100 S. Ct 2051, 2061, 64 L.Ed. 2d 766 (1980); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311, 99 S.Ct. 1705, 1722, 60 L.Ed.2d 208 (1979).[6] Similarly, post-enactment statements of a congressional committee are not entitled much weight. *GTE Sylvania, Inc. supra*, at 118, 100 S.Ct. at 2061; *Weinberger v. Rossi*, 456 U.S. 25, 33-36, 102 S.Ct. 1510, 1517-18, 71 L.Ed.2d 715 (1982). Second, we know of no principle of constitutional law which contemplates that the Congress can by simple legislative fiat overrule, overturn, nullify or render ineffective a decision of the Supreme Court. Any such process would be a serious breach of the separation of powers doctrine inherent in our Constitution. Consequently, we do not give any persuasive effect to the portions of both Representative Conyers' statement and the Senate Judiciary Committee report that this new section "restores the mail fraud provision to where that provision was before the *McNally* decision" or is intended "to reinstate all of the pre-*McNally* case law pertaining to mail and wire fraud statutes without change." Particularly in the case of a criminal statute which the Supreme Court has previously

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5. We read the phrase "including the right of the public to the honest services of public officials" in this report as pure wishful thinking. Surely the staff of the Senate Judiciary Committee knew that Section 2 of S. 2973 was rejected by the House of Representatives; see our discussion of S. 2973 hereinafter.

6. In the case of Representative Conyer's remarks, affording them any weight is dubious, as he voted *against* the final omnibus drug bill. Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 Harv.J.Leg. 153, 169 n. 69 (1994). Furthermore, we note that Representative Conyer's remarks say nothing to explain the substitution of "another" for "organization;" and say nothing about a "state" or "subdivision of a state" being deprived of "an intangible right to good, faithful and honest service;" see our discussion of S. 2973 hereinafter.

held does not extend to or reach conduct which Congress may want to make criminal, the burden is on the Congress to amend that statute so that (i) "it speaks more clearly than it has" *(McNally);* (ii) "gives fair warning to the world in language that the common world will understand" that a crime will be committed if a certain line is passed, *(Bass)*; and (iii) in the area of "the sensitive relation between federal and state criminal jurisdiction," the language makes a "clear statement" which "assures that the legislature has in fact faced . . . the critical matters involved" *(Bass).* We conclude that the one sentence addition accomplished by the passage of 18 U.S.C. § 1346 does not meet the test required by the Supreme Court insofar as the conduct charged to be criminal by the government in this case, i.e. the conduct of a state official alleged to constitute deprivation of the public's right to honest services or good government.

Our conclusion in this regard is bolstered by the legislative history which does show that the same Congress which passed the new 28 U.S.C. § 1346 had before it at least two other bills which expressly spoke to the subject of conduct of public officials which defraud the public of the right to good government. The first of these was H.R. 3050, 100th Cong., 1st Sess., filed July 29, 1987, which provided for the addition of a new section in Chapter 63 of Title 18 of the United States Code which would read as follows:

Section 1346. Definition of Defraud for Certain Sections.

As used in Sections 1341 and 1343, the term "defraud" includes the defrauding of the citizens of a body politic—

1. of their right to the conscientious, loyal, faithful, disinterested and unbiased performance of official duties by a public official thereof; or

2. of their right to have the public business conducted honestly, impartially, free from bribery, corruption, bias, dishonesty, deceit, official misconduct and fraud.

This bill was referred to the House Committee on the Judiciary but was never further acted upon.

Second, the most comprehensive vehicle by which Congress sought to change the *McNally* decision in a manner sufficient to satisfy the tests of *McNally* was Senate Bill 2793 (S. 2793), titled the "Anti-Corruption Act of 1988," which was introduced in the Senate on September 7, 1988, referred to the Judiciary Committee, reported favorably by that committee without a report, and passed later by the Senate on October 14, 1988. This bill was then sent to the House of Representatives where it was referred to the House Judiciary Committee on October 19, 1988. Concurrently with its passage by the Senate, S. 2793 was designated by a unanimous consent agreement of the Senate as one of a large number of amendments to "comprise the joint leadership package" which would be attached as amendments to H.R. 5210, the Drug Initiative Act of 1988, Omnibus, which was then before the Senate having earlier been passed by the House. H.R. 5210 (with S. 2793 included) was then passed by the Senate and sent back to the House. On October 22, 1988, the House of Representatives reconsidered H.R. 5210 with the leadership package of amendments attached in the Senate and made various amendments thereto, and then passed the revised bill. One of the amendments made by the House of Representatives was to delete the text of S. 2973 and substitute therefor the language which now appears codified as 18 U.S.C. § 1346. H.R. 5210 as then amended was sent back to the Senate who concurred in those amendments later on October 22, 1988.

Because of the direct relevance of S. 2973 to the text of what was ultimately passed as 18 U.S.C. § 1346, we append a copy of that bill as an addendum to this opinion and point out that Section 2 of this bill (pages 1-6 of addendum) would have created a new Section 225 entitled "Public Corruption" to be inserted in Chapter 11 of Title 18 of the United States Code which makes criminal: (a) depriving or defrauding the inhabitants of a state or a political subdivision of a state of the honest services of an official or employee of such state or subdi-

vision; and (b) depriving or defrauding the inhabitants of a state or political subdivision of a state of a fair and impartially conducted election process in any primary, runoffs, special or general election. On its face Section 2 of S. 2793 is a fairly comprehensive, articulate and clear attempt to define criminal conduct which would satisfy the requirements of *McNally* that the Congress speak "more clearly than it has" and, in the area of federal/state relations, that Congress clearly express its intention to affect such relations. If Section 2 of S. 2793 had been adopted by the House of Representatives, we would not now be charged with determining the meaning of the statute.

Section 3 of S. 2793,, entitled "White Collar Crime," contemplates the addition of a new § 1346 entitled "Scheme or Artifice to Defraud" which would be added to Chapter 63 of Title 18 of the United States Code. It is apparent that Section 3 of S. 2793 is a progenitor in some respects of the text of 18 U.S.C. § 1346 which was ultimately adopted by both Houses. Change the word "organization" to "another" and put a period after the words "honest services" and you would have the text of what was ultimately passed.

There is no report in the legislative history explaining why the House of Representatives declined to accept the full text of S. 2793 as part of the omnibus Anti-Drug Act of 1988 (H.R. 5210). However, the legislative history does indicate the following facts:

A. No companion bill to S. 2793 was introduced in the House of Representatives either before or after the time when S. 2793 was introduced in the Senate. Accordingly, the earliest the House Judiciary Committee could have possibly given formal consideration to the content of S. 2793 would have been in the four day window following passage of S. 2793 by the Senate and referral to the House Judiciary Committee on October 19 and final consideration of the Omnibus Drug Bill in the House on October 22, 1988.

B. The only bill previously pending in the House of Representatives during the 100th Congress which dealt with creating a new § 1346 to define the term "defrauding" as used in the mail fraud (1341) and wire fraud (1343) statutes was H.R. 3050 referred to earlier in this opinion. The legislative record does not indicate any hearings held by the House Committee on the Judiciary on H.R. 3050 and likewise there is no indication in the legislative record that the House Judiciary Committee issued any report on this bill.

From these facts we conclude that the House of Representatives clearly refused to join the Senate in the comprehensive definition of crime involving "public corruption" as set forth in Section 2 of S. 2793.

The legislative history likewise does not reveal any express report or statement as to why the House of Representatives opted to change the word "organization" to the word "another" and put a period after the words "honest services" in the portion of Section 3 of S. 2793 which the House of Representatives retained as Section 7603 of the Omnibus Crime Bill. The word "organization" is defined in Section 18 of Title 18 as meaning "a person other than an individual." The substitution of the pronoun "another" for the noun "organization" would work some enlargement of the class of potential victims, since the word "organization" by definition does not mean individual persons. But the critical question to our inquiry here is whether simply by making this one word change the House intended to accomplish the same results that would have been accomplished if Section 2 of S. 2793 had also been adopted. We think not. Simply to pose the question is to answer it. If the House of Representatives truly agreed with the Senate that "depriving the inhabitants of a state or political subdivision of a state of the honest services of an official or employee of such state or subdivision" should become a federal crime when use was made of the mails or interstate wire, radio or television communications, then the clearest and most comprehensive way to do that (and satisfy the Supreme Court's tests in *McNally*) would be to adopt the entirety of Section 2 of S. 2793. The House of Representatives clearly refused to do that. We are not prepared, therefore, to say that the House intended

that the changes made to Section 3 of S. 2793 and the adoption of that changed section would accomplish through the back door what they had decided not to do through the front door.[7]

> Given this legislative history, we draw these conclusions:
>
> 1. Both the House and the Senate certainly knew how to "speak clearly and definitively" on the subject of fraud depriving the citizens of a state or political subdivision of the intangible right of good and honest government, but the House refused to do so: and
>
> 2. None of the bills containing any such express provisions received a majority vote of both houses of Congress. Instead, what was passed by both houses of Congress was a last minute, "bobtailed" compromise which had never been the subject of hearings in either house.

Therefore, we conclude that the wording of § 1346, (perhaps on its face but for sure when interpreted in light of the legislative history), simply does not effect a change in the portion of the *McNally* opinion which held that the mail fraud statute does not reach "schemes to defraud citizens of their intangible rights to honest and impartial government."

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7. Our conclusion that the House of Representatives during the 100th Congress in 1988 consciously refused to pass Section 2 of S. 2793 is corroborated by the fact that in subsequent Congresses the Senate passed and included in its version of various crime bills provisions almost verbatim the same as the provisions of Section 2 of S. 2793. *See* 135 Cong. Rec. S12,430-32 (daily ed. Oct. 3, 1989) (statement of Sen. Biden); 136 Cong.Rec. S6638-39 (daily ed. May 21, 1990) (statement of Sen. Biden); 137 Cong.Rec. S9382-83 (daily ed. July 9, 1991); 138 Cong.Rec. S.6911-12 (daily ed. May___. 1992). None of these Senate proposals were adopted by the House of Representatives. In our view, there is clear evidence over a number of Congresses that the House of Representatives does not agree with the Senate as to the need for "public corruption" legislation. Likewise, we read the continued efforts by the Senate to introduce and pass provisions expressly dealing with "public corruption" as an indication that the Senate has at least some doubts as to the efficacy of 28 U.S.C. § 1346 as passed in 1988 to accomplish the criminalization of "conduct of public officials depriving the public of honest service or good government."